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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 783

RAILWAY EXPRESS AGENCY, INCORPORATED,

Petitioner,

v.

JACKSONVILLE TERMINAL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

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JACKSONVILLE TERMINAL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of The United States:

The petitioner prays that a writ of certiorari issue to review the judgment of The United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on November 17, 1961.

CITATIONS TO OPINIONS BELOW

The trial Court, The United States District Court, In and For The Southern District of Florida, Jacksonville Division, delivered no opinion but final judgment consequent upon a

jury verdict was entered by that Court on September 21, 1960 providing that Respondent take nothing by its suit and that Petitioner recover of and from Respondent its costs in the sum of $85.95. The Final Judgment of the District Court (R. 341) is printed in Appendix B hereto at page 4a.

The opinion of the Circuit Court of Appeals reversing this judgment is printed in Appendix B hereto at page 5a and is reported in 296 Fed. 2d 256. The judgment of the Circuit Court of Appeals is printed in Appendix B hereto at page 19a.

The Order of the Circuit Court of Appeals denying Petition For Rehearing (R. 378) is printed in Appendix B hereto at page 23a.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 17, 1961 (R. 353) and is printed in Appendix B hereto at page 19a. Rehearing was denied on January 11, 1962 (R. 378); page 23a, infra. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254(1) and Rule 19 1(a), Rules of The Supreme Court of The United States.

QUESTIONS PRESENTED

I

WAS NOT THE PETITIONER DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIED EQUAL PROTECTION OF THE LAWS, AS GUARANTEED BY SECTION 1, FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND SECTION 1, DECLARATION OF RIGHTS, CONSTITUTION OF THE STATE OF FLORIDA, BY THE LOWER COURT'S HOLDING THAT THE PETITIONER COULD NOT INTERPOSE, IN A SUIT FOR INDEMNIFICATON BROUGHT AGAINST IT BY THE RESPONDENT UNDER THE PROVISIONS OF AN INDEMNIFICATION CLAUSE IN A LEASE AGREEMENT, A SET-OFF OR DEFENSE BASED UPON THE RESPONDENT'S BREACH OF ANOTHER CLAUSE OF THE SAME LEASE AGREEMENT WHICH LATTER BREACH OF CONTRACT ON THE PART OF THE RESPONDENT CAUSED OR PRODUCED THE LOSS FOR WHICH INDEMNIFICATION WAS SOUGHT?

II

BEFORE REVISING ESTABLISHED FLORIDA SUBSTANTIVE LAW, OR INTERPRETING SUCH SUBSTANTIVE LAW WHEN THE LOWER COURT WAS OBVIOUSLY IN DOUBT AS TO THE EXACT STATUS OF SUCH LAW IN FLORIDA, SHOULD NOT THE LOWER COURT HAVE CERTIFIED THE QUESTION AS TO THE STATUS OF THE FLORIDA LAW TO THE SUPREME COURT OF FLORIDA FOR ITS DECISION, UNDER THE PROVISIONS OF SECTION 25.031, FLORIDA STATUTES, RULE 4.61, FLORIDA APPELLATE RULES AND IN ACCORDANCE WITH CLAY V. SUN INSURANCE

OFFICE, LTD., 363 U.S. 207; 4 L. ED. 2D 1170, 80 S. CT. 1222, ESPECIALLY WHEN SUCH POINT OF FLORIDA SUBSTANTIVE LAW CONCERNS THE INTERPRETATION OF INDEMNIFICATION CLAUSES IN CONTRACTS BETWEEN PARTIES WHO ARE NOT IN BUSINESS TO FURNISH INDEMNITY FOR A PREMIUM, SUCH AS INSURANCE COMPANIES?

CONSTITUTIONAL SECTION AND STATUTE INVOLVED

The constitutional provisions involved are Section 1, Fourteenth Amendment to the Constitution of The United States of America, and Section 1, Declaration of Rights, Constitution of The State of Florida. They are printed in Appendix A hereto at page 1a.

The statutory provision involved is Section 25.031, Florida Statutes. It is printed in Appendix A hereto at page ..... Rule 4.61, Florida Appellate Rules is printed in Appendix A hereto at page 2a.

STATEMENT OF THE CASE

Respondent is, and has been for many years, engaged in the business of operating the Terminal Station at Jacksonville, Florida and the tracks and facilities connected therewith. This includes the switching and classifying of railroad cars; the inspection of the same within the confines of Respondent's yards; and the making up of trains to be moved from the premises by the various participating railroads.

The Petitioner is engaged in the express business, utilizing primarily rail transportation.

Certain premises adjoining the main yards of the Respondent were leased many years ago by Respondent to Petitioner. Paragraph 5 of the lease agreement, as it existed at all times material herein, reads as follows:

> "It is further agreed that all of the railway tracks, constructed upon the land hereby leased and demised, which said land is intended to be outlined by the red lines on the photostatic map attached hereto and made a part hereof, *shall be constructed and maintained by the Terminal Company according to its standard*, but cost of such construction and maintenance shall be paid by the Express Company; provided, however, that the Terminal Company shall construct and maintain at its expense all railway tracks necessary to afford proper connections to railway tracks aforesaid, *and the Terminal Company shall operate all of the said railway tracks*." (emphasis supplied)

Paragraph 9 of said lease agreement, insofar as it is applicable to this controversy, reads as follows:

> "Inasmuch as the station facilities are operated and maintained for the joint and common use of all Railway Companies using the Terminal Company's station and property, it is hereby expressly stipulated and agreed that the said Express Company will fully indemnify and save harmless the said Terminal Company and the Railway Companies using the Terminal Company's station and property from and against all charges, expenses, loss, damages, injuries, suits or judgments, arising by reason of or in connection with occupation and use of the premises of the Terminal Company by the Express Company under this agreement, whether to the property of, or persons in the employ of, the

Terminal Company or the railway companies hereinbefore mentioned, or to third persons or property of third persons not parties hereto. * * * * * " (emphasis supplied)

An employee of Respondent (C. C. Johnson) was injured while switching railroad cars which had been loaded by Petitioner with express, but which had already been moved away from the Petitioner's loading platforms at the time of the injury. The injury occurred on a storage track located on the leased premises. At the time Respondent's employees were switching cars and classifying same to make up the consist of a train which was scheduled to depart from the Terminal Station later that night.

It was after dark and the injured employee, at the time of his injury was manually aligning a drawhead on one of the cars because of its failure to automatically couple upon impact. In doing so, the rotten edge of a crosstie crumbled under his foot, causing his foot to slip down into a hole by the crosstie, and resulting in an injured back.

This employee sued Respondent in the Florida State Courts. The first count of his Complaint was under the Federal Safety Appliance Act, Section 2, Title 45, United States Code, and the second count was under the Federal Employer's Liability Act, Sections 51-60, Title 45, United States Code. Issue was joined and the cause tried to a jury on both counts of the Complaint, resulting in a general jury verdict against the Respondent. Respondent paid the judgment and costs, which amounted to $43,483.08. In addition thereto, other expenses were incurred by Respondent. Respondent's total expenses, including the payment of the aforesaid judgment and costs, amounted to $68,059.63.

Respondent then sued Petitioner in the State Courts of Florida for recovery of such expenses. Respondent's Complaint (R. 1) was based upon the indemnification clause in the lease to Petitioner (Paragraph 9 of the lease, supra, page 5). Petitioner removed the cause to the District Court pursuant to Section 1441, et seq., Title 28, United States Code, as amended. The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff (Respondent here) being a Florida corporation and the defendant (Petitioner here) being a Deleware corporation. The requisite amount involved, exclusive of interest and costs, existed.

Petitioner raised in its Answer (R. 13) among other defenses, two defenses in bar, namely: (1) that the losses sustained by Respondent were caused by Respondent's failure to properly maintain the track and area involved under the provisions of Paragraph 5 of the lease agreement, (supra, page 5); and (2) that the losses sustained by Respondent were caused by the sole negligence of the Respondent and the lease agreement does not provide for indemnification by Petitioner to Respondent for losses sustained by Respondent caused by its own sole negligence.

The issues joined were tried to a jury and submitted to the jury under appropriate instructions by the Trial Court in Special Verdict form (R. 339) containing three interrogatories, to-wit:

> "Interrogatory No. 1. Has the plaintiff Jacksonville Terminal Company proved by a preponderance of the evidence that the loss and damage claimed herein (the loss and damage under the judgment upon the C. C. Johnson claim and expenditures incident thereto) arose by reason of or in connection with the occupation and

use of the leased premises by the Railway Express Agency?"

"Interrogatory No. 2. Has the defendant Railway Express Agency proved by a preponderance of the evidence that said loss and damage claimed herein by the Jacksonville Terminal Company was caused by reason of the Jacksonville Terminal Company's breach of its contractual duty (under numbered Paragraph 5 of the Lease Agreement, plaintiff's Exhibit 1) to properly maintain track 7-A at the place where C. C. Johnson was injured, in accordance with the standard of maintenance of Jacksonville Terminal Company?"

"Interrogatory No. 3. Has the defendant Railway Express Agency proved by a preponderance of the evidence that the said loss and damage claimed by Jacksonville Terminal Company herein was caused solely by the negligence of Jacksonville Terminal Company in failing to properly maintain Track 7-A at the place where the employee C. C. Johnson was injured?"

The first interrogatory was answered by the jury in the negative and the second and third interrogatories were answered in the affirmative (R. 339).

Consequent thereon the trial court entered Final Judgment for Petitioner (R. 341).

Respondent then appealed to the Circuit Court of Appeals. After briefs were filed and oral argument presented, the Circuit Court of Appeals on November 17, 1961 delivered its Opinion (R. 353; Appendix B hereto, page 5a) reversing the trial court. On the same date the Circuit Court of Appeals

entered its judgment (R. 378; Appendix B hereto, page 19a) directing that judgment be entered by the trial court in favor of Respondent and against Petitioners in the sum of $68,062.62.

Petitioner filed in the Circuit Court of Appeals its Petition for Rehearing, which is printed in Appendix B hereto at page 19a, and the Circuit Court of Appeals, on January 11, 1962, denied said petition (R. 378; Appendix B, page 23a).

After appropriate order was entered by the Circuit Court of Appeals on February 7, 1962 (R. 383) staying the mandate, the Petitioner filed this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

By its holding in the instant case, the Court below has ruled that, despite a jury's finding that Respondent's losses were *caused* by its breach of contractual duty under Paragraph 5 of its lease agreement (supra., page 5) to properly maintain the track, such finding is immaterial and the Petitioner cannot defend a claim for indemnification on those grounds.

In other words, the Court below has upheld the Respondent's right to enforce the contract and to recover from the Petitioner under one clause of the contract, but has denied to the Petitioner the right to enforce the contract. Under this ruling, the Court has said, in effect, that the Respondent can breach its contractual duty to maintain the tracks with impunity; that such breach of contract on the part of the Respondent can cause or produce accidents to its employees resulting in loss by way of judgments against the Respondent; that the Respondent can recover its losses from Petitioner

under the indemnity clause of the contract; but the Petitioner *cannot* enforce the *same* contract and interpose as a defense the Respondent's breach of contract which *caused and produced* the loss.

This is a clear deprivation of Respondent's property without due process of law and a denial to Petitioner of the equal protection of the laws, as guaranteed by Section 1, Fourteenth Amendment to the Constitution of the United States, and Section 1, Declaration of Rights, Constitution of The State of Florida.

II

The decision of the Court below is in direct conflict with a decision of the Florida Supreme Court in *Jackson, et al v. Florida Weathermakers*; 55 So 2d 575 (Appendix C, infra., pp 24a-32a). Such decision is also in conflict with and upsets a well settled principle of law enunciated by the Fifth Circuit Court of Appeals in the cases of *Batson-Cook v. Industrial Steel Erectors*, 257 Fed 2d 410; *Martin, et al v. American Optical Co.*, 184 Fed 2d 528; *Southern Bell Telephone & Telegraph Company v. Mayor and Board of Aldermen of City of Meridian, Miss.*, 74 Fed 2d 983; *Employers Casualty Co. v. Howard P. Foley Co., Inc.*, 158 Fed 2d 363; *Haliburton Oil Well Cementing Company v. Paulk*, 180 Fed. 2d 79; and *Standard Oil Company of Texas v. Wampler*, 218 Fed 2d 768.

In the Florida Weathermakers case, the Florida Supreme Court clearly ruled that in Florida indemnity clauses in contracts will not be construed so as to indemnify the indemnitee against the consequences of his own negligence unless such intent is expressed in clear and unequivocal terms.

Nevertheless, the Court below has by its decision in the instant case departed from the basic underlying reasoning upon which this well settled principle of law is founded and has departed from the majority view in this country (Volume 27, *American Jurisprudence, Indemnity*, Section 15; *Annotation*, 175 ALR 8, page 29), apparently adopting a new theory that indemnity clauses in general business contracts should be construed most strictly against the *indemnitor* and in favor of the indemnitee.

Since this holding by the Court below is in direct conflict with the settled law on the subject and with a prior decision of the Supreme Court of Florida on a point of Florida substantive law, the lower Court should have certified the question to the Florida Supreme Court for its opinion under the provisions of Section 25.031, Florida Statutes and Rule 4.61, Florida Appellate Rules (Appendix A hereto, pages 1a and 2a) and pursuant to *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207, 4 L. Ed. 2d 1170, 80 S.Ct. 1222.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 6, 1962

APPENDIX A

1. Section 1, Fourteenth Amendment to The Constitution of the United States:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Section 1, Declaration of Rights, Constitution of The State of Florida:

"All men are equal before the law, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing happiness and obtaining safety."

3. Section 25.031, Florida Statutes:

"The supreme court of this state may, by rule of court, provide that, when it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that then are

involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer."

4. Rule 4.61. Florida Appellate Rules — Certified Questions From Federal Courts:

a. *When Certified.* When it shall appear to the Supreme Court of the United States, or to any of the Courts of Appeal of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal appellate court may certify such questions or propositions of law of this State to the Supreme Court of Florida for instructions concerning such questions or propositions of state law.

b. *Jurisdiction.* Questions or propositions of law referred to in sub-paragraph a hereof shall be certified for answer to the Supreme Court of this State.

c. *Method of Invoking Rule.* The provisions of this rule may be invoked by any of the federal courts referred to in sub-paragraph a hereof upon its own motion or upon the suggestion or motion of any interested party when approved by such federal court.

d. *Contents of Certificate.* The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the quesitons or propositions of law arise and the question of law to be answered.

e. *Preparation of Certificate.* The certificate may be prepared by stipulation or as directed by such federal court. When prepared and signed by the presiding judge of said federal court, it shall be certified to the Supreme Court by the clerk of the federal court and under its official seal. The Supreme Court may, in its discretion require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of said cause.

f. *Costs of Certificate.* The costs of the certificate and filing fee shall be equally divided between the parties unless otherwise ordered by this Court.

g. *Briefs and Argument.* The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within thirty days after the filing of said certificate in the appellate court of this State having jurisdiction. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within twenty days after the receipt of appellant's or moving party's brief and a reply brief shall be filed within ten days thereafter.

h. *Oral Argument.* Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the Court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits. Added effective March 1, 1961.

APPENDIX B

1. FINAL JUDGEMENT ENTERED BY DISTRICT COURT

Filed Sep. 21, 1960.

United States District Court, Southern District of Florida, Jacksonville Division.

Jacksonville Terminal Company, a Florida corporation,

Plaintiff,

vs. No. 4277-Civil-J.

Railway Express Agency, Incorporated, a Delaware corporation, Defendant.

Upon consideration of the Jury's Verdict herein it is Considered and Ordered:

That the Plaintiff Jacksonville Terminal Company, a Florida corporation, shall take nothing by its suit herein, and the Defendant, Railway Express Agency, Incorporated, a Delaware corporation, shall recover of and from the Plaintiff, Jacksonville Terminal Company, a Florida corporation, its costs lawfully incurred in this cause and hereby taxed in the sum of $85.95, for which let execution issue according to law.

Attest:

JULIAN A. BLAKE,
Clerk,

By FRANK HENDERSON, JR.,
Deputy Clerk.

Entered September 21, 1960.

2. OPINION OF CIRCUIT COURT OF APPEALS Dated November 17, 1961:

(Caption Omitted)

Before TUTTLE, Chief Judge, JONES and WISDOM, Circuit Judges.

TUTTLE, Chief Judge: Jacksonville Terminal Company (JTC), appeals from a judgment of the trial court, entered upon the jury's answers to three interrogatories, rejecting its claim for indemnity against the defendant, Railway Express Agency (REA).

JTC was the lessor and REA the lessee of railway terminal property in Jacksonville, Florida. The lease contained the following provisions:

> 5. It is further agreed that all of the railway tracks constructed upon the land hereby leased and demised . . . shall be constructed and maintained by the Terminal Company according to its standard, but cost of such construction and maintenance shall be paid for by the Express Company, provided, however, that the Terminal Company shall construct and maintain at its expense all railway tracks necessary to afford proper connections to railway tracks aforesaid, and the Terminal Company shall operate all the said railway tracks.
>
> 9. Inasmuch as the station facilities are operated and maintained for the joint and common use of all Railway Companies using the Jacksonville Terminal Company's station and property, it is hereby expressly stipulated that the said Express Company will fully indemnify and save harmless the said Terminal Company and the Railway Com-

panies using the Terminal Company's station and property from and against all charges, expenses, loss, damage, injuries, suits, or judgments, arising by reason of or in connection with occupation and use of the premises of the Terminal Company by the Express Company under this agreement, whether to the property of, or persons in employ of, the Terminal Company . . .

On March 9, 1954, one Johnson, a switchman employed by JTC, suffered a back injury while working in a yard consisting of a system of railroad tracks used for switching express cars. Although the yard was leased to REA by JTC, it was maintained and operated by JTC in accordance with Paragraph 5 of the lease. The cars upon which Johnson was working had already been loaded by REA with express matter, and were on a spur or storage track in the leased yard. Johnson was engaged in classifying and taking out the cars which were to be incorporated in an outgoing train.

At the time of his injury, Johnson was aligning a draw bar on one of the cars so that it would couple upon impact with another car. The injury resulted from his stepping on a rotten crosstie which caused his foot to slip down into a hole approximately 6 to 8 inches deep and 12 to 14 inches wide alongside the crosstie.

Johnson was compensated for his injury in the following manner: JTC provided him with medical services and paid for his lost time, amounting to $18,917.89. Johnson then sued JTC in a state court under the Federal Employers Liability Act and Federal Safety Appliances Act. REA rejected JTC's demand to defend Johnson's action, and John-

son thereafter recovered a judgment against JTC for another $43,483.08.

JTC then brought this suit, claiming that, under paragraph 9 of the lease, REA was required to indemnify JTC for the above expenses, plus the expense of defending Johnson's state court action. The total claimed was $68,062.62.

REA resisted this suit on the following principal grounds: First, that the injury did not arise "by reason of or in connection with occupation and use of the premises of the Terminal Company by the Express Company" within the meaning of paragraph 9 of the lease; second, that the injury was caused solely by JTC's negligence in failing to maintain the storage track in a safe and proper condition; and third, that the injury was caused solely by JTC's breach of its contractural duty, under paragraph 5 of the lease, to maintain the track "in accordance with its standard."

With respect to the meaning of the indemnity clause (Paragraph 9), the trial court charged the jury as follows:

> Now, the question then is, that you must answer here, is whether or not this loss and damage . . . arose by reason of or in connection with the occupation and use of these premises by the Express Agency, or did it arise from some other reason? The plaintiff has the burden of showing that it arose by reason of the occupation and use of the premises by the Express Agency.
>
> Now, in that framework you are required under this first question to decide whether or not these injuries and the incident loss and expenses . . .

arose by reason of or in connection with the occupation and use that the Express Company was there, or they arose from some other reason; that is, if they arose from the occupation and use of the premises by the Terminal Company and not by reason of or in connection with the use and occupation of the premises by the Railway Express Company, why then, of course, you would answer that question in the negative.

If you find from a preponderance that they did arise by reason of the use and occupation . . . of the leased premises by the Express Agency, you should answer that question in the affirmative.

The trial court further instructed the jury to return a verdict for REA if it found that Johnson's injury was caused by JTC's negligence or breach of contract in failing to maintain the storage track in a safe and proper condition. In other words, the court construed the indemnity clause as not protecting JTC from losses due to its own negligence or failure to perform satisfactorily its obligations under other provisions of the lease agreement.

In accordance with these instructions, the jury returned a verdict for REA, finding (1) that Johnson's injury did not arise "By reason of or in connection with occupation and use of the premises of the Terminal Company by the Express Company," and (2) that the injury was caused by JTC's negligence and breach of contract in failing to maintain the storage track in a safe and proper conditon.

In resolving the issues presented by this appeal, there are two preliminary points which must be kept in mind.

First, since the lease agreement was made and performed in Florida, it is clear that the law of that state controls as to the construction and validity of the indemnity clause.[1] *Pacific Portland Cement Co. v. Food Machinery & Chemical Corp.*, 9 Cir., 198 F. 2d 541; second, it is also clear that, in Florida, as elsewhere, the cardinal rule of construction is to ascertain the intention of the contracting parties and to give effect to that intention if it can be done consistently with legal principles. *St. Lucie County Bank & T. Co. v. Aylin*, 94 Fla. 528 114 So. 438. Where the language chosen by the parties, given its ordinary and natural meaning, unambiguously manifests that intention, the judicial task is at an end. *McGhee Interests v. Alexander National Bank*, 102 Fla. 140, 135 So. 545.

With these propositions in mind, we conclude that the judgment below was erroneous, and that a judgment should have been entered in favor of the plaintiff-appellant, JTC, for the amount claimed.

An examination of the trial court's instructions reveals a failure to stress or explain what we think is the crucial language in the indemnity clause. The court emphasized the phrase "by reason of," which, given its ordinary and natural meaning, implies a need for some sort of a causal relationship between REA's occupation and use of the premises and the resultant injury. On the other hand, the court

---

[1] Since the clause merely provides for indemnification and does not purport to limit JTC's liability to its employees, under the Federal Employers Liability Act or the Federal Safety Appliance act, the clause is not void under 45 U. S. C. A. § 55. Chicago v. N. W. Ry. Co. v. Davenport, 5 Cir., 205 F. 2d 589. Further, since JTC did not contract in the capacity of a common carrier, subject to the provisions of the Interstate Commerce Act, the indemnity clause is not void as being contrary to the spirit and provisions of the Act. Cf. Chicago & N. W. Ry. Co. v. Davenport, supra.

minimized the significance of the phrase "in connection with," which does not ordinarily refer to causal connection; and there is no indication that the parties intended this phrase to convey other than its ordinary meaning in the context of the indemnity clause.

Moreover, the jury was instructed to consider whether the loss "arose from the occupation and use of the premises by the Terminal Company and not by reason of or in connection with the use and occupation of the premises by the Express Company." This clearly implies that if the loss arose by reason of JTC's use and occupation of the premises, it could not have arisen in connection with REA's use and occupation of the premises. In our view, these elements were not mutually exclusive. We fail to see why the injury could not have arisen by reason of JTC's use and occupation of the premises and still have arisen in connection with REA's business on the premises.

The Supreme Court of Florida has interpreted the phrase, "in connection with" in the following manner:

> The words, "in connection with that company's railways" as used in relation they bear to the whole clause, are equivalent of "in the interest and upon the employment of that company in and about its railways and the operation and management thereof, and growing out of the proper and legitimate business of the company as the possessor and operator of such railways." J. Ray Arnold Corporation of Olustee v. Richardson, 105 Fla. 204; 141 So. 133.

Given this phrase the meaning attributed to it by the Florida Supreme Court, we find no escape from the conclusion that Johnson's injury arose "in connection with" the

occupation and use of the terminal premises by REA. Even though the Express yard was maintained and operated solely by JTC, it is clear that Johnson's job of incorporating the fully loaded express cars into an outgoing train "grew out of the proper and legitimate business" which REA conducted on the Terminal premises. As JTC points out in its brief:

> The injury to Johnson occurred on the premises occupied by the Express Company under the lease containing the indemnity clause. Johnson was performing a switching movement in the operation of the tracks under the provisions of the lease for the account of the Express Company, and the switching movement constituted an essential element to the conduct of the Express Company's business, which includes forwarding of express matter.

In the undisputed facts touching on this point, we think the trial court should have itself concluded that Johnson's injury arose "in connection with" REA's occupation and use of the premises. The submission of this question of contract construction to the jury was therefore unwarranted. *Solary v. Stultz*, 22 Fla. 263.

Having concluded that Johnson's injury and the consequent loss arose in connection with REA's occupation and use of the premises, we must next decide whether REA's contract to indemnify JTC against liability for "all losses, etc." so arising was meant to include losses resulting from JTC's negligence. In other words, we have already determined that Johnson's injury was *physically* connected with REA's business on the premises. We now turn to the question whether the parties intended the indemnity clause to apply to all losses so connected, or whether they meant it to be inapplicable to losses caused by the negligence of the indemnitee, JTC.

At first glance, this would not seem to present a difficult problem of interpretation, for given its ordinary and natural meaning, the word "all" leaves no room for exceptions. Since, absent extraordinary circumstances, we are bound to interpret a contract in accordance with the natural and ordinary meaning of the language employed therein, there would appear to be no alternative to the conclusion that, under Paragraph 9 of the lease, REA was obligated to indemnify JTC for losses due to the latter's negligence.

Unfortunately, however, the solution is not so simple. We are faced with numerous cases wherein it has been held that a promise to indemnify for "all losses, etc." will not relieve the indemnitee from liability for losses caused by his own negligence. Apparently, the theory underlying these decisions is that the assumption of this liability is such an "unusual" and "hazardous" undertaking, that there can be no presumption that the indemnitor meant to assume it absent explicit reference to the indemnitee's negligence in the contract. Indeed, this is perhaps the majority, although far from a universally accepted, rule.[2]

Appellee claims, and the District Court agreed, that the courts of Florida have adopted the majority view. In support of this contention, appellee cites *Jackson et al v. Florida Weathermakers*, 55 So. 2d 575 (Fla. 1951). In that case, the court rejected a plea for indemnity for loss due to the indemnitee's negligence where the plea was based merely on the indemnitor's promise to procure "public liability insurance." The court stated that the the contract, "in the absence of clear and unequivocal terms must be construed to be a

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[2]See the discussion in 27 Am. Jur. Indemnity Section 15.

contract to indemnify only against the negligence of the indemnitor, and not that of the indemnitee"

It is apparent that there is nothing in the Jackson case which justified appellee's contention. No promise to indemnify against "all losses, etc." was involved there, and the statement that the contract must clearly and unequivocally manifest the parties' intention to absolve the indemnitee from liability for losses caused by his own negligence is entirely consistent with those cases which have held that broad language of the kind under consideration here *is* such a clear and unequivocal manifestation. See e.g. *Griffiths v. Henry Broderick, Inc.*, 27 Wash. 2d 901; 182 P. 2d 18.

The other cases involving Florida law on this point also fail to support the position for which appellee contends.

In *Ringling Bros. Barnum and Bailey Combined Shows, Inc. v. Olvera*, 119 F. 2d 584 (9th Cir., 1941), the court interpreted Florida law as protecting a circus from the consequences of its own negligence where a circus performer had released the circus from all liability "growing out of any injury or accident to the person and/or property of the Artist in any transaction whatsoever during the period of performance under this contract . . ." Now, although this case involved a release provision rather than a true indemnity clause, in a very real sense it presented much the same issue as presented in the indemnity case, viz., interpretation of a contractural provision purporting to absolve a party from liability for loss caused by his own negligence. The court rested its decision on a number of Florida cases holding that it is not against public policy for an indemnitee to contract himself out of liability for damage resulting from his own negligence.

In *Thomas* v. *Atlantic Coastline R. Co.*, 201 F. 2d 167 (5th Cir. 1953), the indemnitor had agreed to indemnify the railroad for all damage "whether the same is the result of fire caused by the negligent emission of sparks from the locomotive engines of Lessor, or otherwise, however resulting." The damage at issue had been caused by the negligence of the railroad's employees in failing to extinguish a fire which they had kindled adjacent to the railway track. The court, purporting to apply Florida law, held that the damage was included within the coverage of the indemnity clause, stating:

> We think in view of the surrounding circumstances and of the express provision of the contract that the privilege accorded by the lease shall be enjoyed solely at the risk of appellant, that it was unquestionably the intention of the contracting parties to exempt appellee railroad from liability for ordinary negligence in respect to all claims from fire regardless of origin or however resulting.

In *Russell* vs. *Martin*, 88 So. 2d 315 (Fla. 1956), the indemnitor had agreed to "indemnify and save harmless the Railroad from any and all claims arising out of the use of said (railway) crossing, and that he would use said crossing at his own risk and would not rely on the Railroad . . . for signals or warnings of approaching trains." The damage complained of was allegedly caused in part by the railroad's running a train at a "high and dangerous" speed in violation of a town ordinance. The damage occurred at the involved crossing, and it was alleged that the railroad was negligent in failing to signal the train's approach. Though the negligent act of running the train at a "high and dangerous" speed in violation of the ordinance was not ex-

pressly covered by the indemnity clause, the court held that it was included within the scope of the clause's protection.

While all the above cases are factually distinguishable from the instant case, it seems clear that they do not adopt the majority view requiring the indemnity contract to contain an express stipulation relieving the indemnitee from liability for loss resulting from his own negligence. Consequently, in construing paragraph 9 of the lease, we are unfettered by any rule of construction which would require us to do violence to the plain and clear meaning of the language employed therein. And, left to traditional rules of construction, we do not hesitate to conclude that REA's promise to indemnify JTC for "all losses, etc." clearly and unequivocally manifests an intention to absolve JTC from liability for all losses, including those caused by its own negligence.

Appellee would have us apply the majority rule notwithstanding that we are not bound to do so under the law of Florida. Having found what this Florida law is we do not feel that we have the right to do so. However, if we had that option, it is appropriate to say that we would be more receptive to this suggestion if we felt that application of that rule would produce benefits outweighing the harm caused by any departure from the obvious meaning of the language chosen by the parties. But we do not think this is the case. In our view, the majority rule rests on an unsound and dangerous foundation.

It presumes, first of all that one party's assumption of liability for losses due to another's negligence is an "unusual" and "hazardous" undertaking. We cannot agree. In the light of modern conditions, we perceive little justification for so characterizing the indemnitor's obligation. Insurance companies assume this obligation every day, especially

in connection with automobile liability policies. And, it is common knowledge that the device of insuring against one's own negligence through indemnity contracts is frequently employed in other business ventures.

Perhaps more important, even assuming that the burden imposed on the indemnitor is "unusual" or "hazardous", the majority rule presumes that courts have the power to alleviate or eliminate this burden by construing the indemnity agreement in a manner which is patently inconsistent with the plain and clear meaning of the language employed by the contracting parties. This is a dangerous and unwarranted extension of the judicial function. If a court feels that a contract imposes an extraordinary liability on one of the parties, it may, in certain instances, pronounce the contract void as being contrary to public policy.[3] But where, as here, a contract does not violate public policy, we have no authority to achieve the same result by concluding that the parties did not really mean what the unambiguous language of their agreement imports.

There was no mistake of fact or law which induced either of the parties to enter into this contract. There was no fraud or duress. The parties were admittedly of equal bargaining power. Indeed, REA itself drafted the terms of the indemnity clause. In this situation, we must adhere to the wise and well established principle that the court will not make a contract for the parties. REA freely consented to indemnify JTC for

[3] To be sure, until recently, a majority of courts held that an indemnity contract purporting to absolve the indemnitee from liability for his own negligence was void as against public policy. This view has long since been rejected in all but a few jurisdictions. See 27 Am.Jur. Indemnity, Section 9. Russell v. Martin, 88 So. 2d 315 (Fla. 1956).

"all losses, etc." arising in connection with its use and occupation of the terminal premises. It did not see fit to exclude losses caused by JTC's negligence. It cannot now complain of the consequences.[4]

We conclude, therefore, that the trial court erred in refusing to strike REA's defense based on JTC's alleged negligence in failing to maintain the storage track in a safe and proper condition.

We are aware that, at least on the surface, our conclusion is inconsistent with this Court's recent decision in *Batson Cook v. Industrial Steel Erectors*, 5 Cir., 257 F. 2d 410. However, since we there purported to apply Alabama law in construing the Alabama Contract,[5] that case has no effect on our interpretation of the instant contract, which is controlled by the law of Florida.

[4] In fact, with all deference to the Courts that have concluded that an agreement to protect a person from liability for his own negligence is unusual or hazardous, it really appears that this would be the ordinary and normal purpose for an indemnity agreement such as we have before us. In the generality of cases the indemnitee (here JTC) does not have any concern for being indemnified against claims or judgments against the indemnitor (here REA) unless the indemnitee is in danger of being held liable for damages in favor of such claimant or judgment creditor. Normally no such hazard would arise unless the indemnitee becomes liable to such claimant because of its negligence or violation of a statutory duty, since the rule of no liability without fault is the general rule. Thus it would seem that the purpose of taking such an indemnity agreement is generally to put at rest once for all the question whether indemnitee can be made to respond to injured parties for its actions which might be found to result from its fault.

[5] It is significant, however, that in Republic Steel Corp. v. Payne, 132 So. 2d 581, decided On June 29, 1961, the Supreme Court of Alabama took a position which appears to be inconsistent with the majority rule which was followed in Batson Cook. In construing a covenant of release of liability of the grantors on sale of land, the Alabama Supreme Court held that a release "from **any** and **all** claims for damages and **all** liability" included a release from a claim based on the negligence of the grantor itself.

For much the same reasons, there is no merit in the contention that the indemnity clause does not protect JTC against liability for loss due to the alleged breach of its contractural duty, under paragraph 5 of the lease, to maintain the storage track "in accordance with the standard". The indemnity clause contains no exception for such loss, and we are powerless to add one.

Moreover, it is apparent that paragraph 5 and paragraph 9 of the lease are independent covenants, the breach of one having nothing to do with the enforceability of the other. This is familiar and settled law; and the point requires no elaboration here. *Zanbetti v. Commodores Land Co.*, 102 Fla. 596, 136 So. 644; *Houston & Texas Central R. Co. v. Diamond Press Brick Co.*, 111 Tex 18, 222 S.W. 204. Since JTC's alleged breach of paragraph 5 was no defense to its assertion of REA's liability under paragraph 9, we hold that the trial court erred in refusing to strike REA's defense based on JTC's alleged breach of contract.

Having concluded that the expenses attendant upon Johnson's injury came within the scope of REA's promise of indemnity, and there being no dispute as to the correctness of JTC's computation of these expenses, we reverse the judgment below and direct that a judgment be entered in favor of JTC for $68,062.62.

REVERSED

3. JUDGMENT OF CIRCUIT COURT OF APPEALS ENTERED NOVEMBER 17, 1961:

"This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed with directions that a judgment be entered in favor of Jacksonville Terminal Company for $68,062.62.

It is further ordered and adjudged that the appellee, Railway Express Agency, Incorporated, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court."

4. PETITION FOR REHEARING:

(Caption Omitted)

Under the provisions of Rule 29, Rules of the Fifth United States Circuit Court of Appeals (Title 28, U.S. Code), the Appellee, Railway Express Agency, Incorporated, a corporation, respectfully petitions this Honorable Court for a rehearing in this cause and for reconsideration by this Honorable Court of its opinion and decision filed on November 17, 1961. The following grounds and reasons are assigned for the granting of this Petition, to-wit:

1. This Court has, by its opinion of November 17, 1961, in this cause committed the State of Florida to the minority

view that in indemnity clauses contained in general commercial contracts the indemnitee may successfully indemnify himself against the results of his own negligence without spelling out such intent in clear and uniquivocal terms despite a decision of the Florida Supreme Court to the contrary (*Jackson, et al v Florida Weathermakers*, 55 So. 2d 575).

2. This Court has, by its aforesaid opinion of November 17, 1961 interpreted and prescribed the Florida law on indemnity contracts (between parties who are not in business to furnish indemnity for a premium, such as insurance companies) contrary to the overwhelming weight of authority not only in the United States as a whole, but also in the states comprising the Fifth United States Circuit. Sec. 27 *American Jurisprudence, Indemnity*, Section 15; *Annotation*, 175 A. L. R. 8, page 29; *Batson-Cook v Industrial Steel Erectors*, 257 Fed. 2d 410, (CCA-5; Ala.); *Martin*, et al v. *American Optical Co.*, 184 Fed. 2d 528 (CCA-5; Ga.); *Southern Bell Tel. & Tel Co. v. Mayor and Board of Aldermen of City of Meridian, Miss.*, 74 Fed. 2d 983 (CCA-5; Miss.); *Employers Casualty Co. v. Howard P. Foley Co., Inc.*, 158 Fed. 2d 363 (CCA-5; Tex.); *Halliburton Oil Well Cementing Co. v. Paulk*, 180 Fed. 2d 79 (CCA-5; Tex.); *Standard Oil Company of Texas v Wampler*, 218 Fed. 2d 768 (CCA-5; Tex.)

3. This Court, by its aforesaid opinion of November 17, 1961 has erroneously confused the law pertaining to indemnity contracts contained in insurance contracts or policies with the law pertaining to indemnity clauses in contracts where indemnity is not the principal purpose of the contract and where the contract is from one not in the indemnity business. See *Employers Casualty Co. v. Howard P. Foley Co., Inc.*, 158 Fed. 2d 363, page 364 (CCA-5; Tex).

4. This Court has, by its aforesaid opinion of November 17, 1961, repudiated the overwhelming majority view on the general law governing interpretation of indemnity contracts to the effect that such contracts must be construed most strictly against the indemnitee and that such contracts shall not be construed so as to indemnify the indemnitee against his own negligence unless such intent is spelled out in clear and unequivocal language; all in direct conflict with the settled law in the United States Fifth Circuit as enunciated in numerous prior decisions of this Court. See the cases cited under paragraph numbered 2, above.

5. This Court has, by its aforesaid opinion of November 17, 1961, undertaken to decide and prescribe the Florida law on construction of indemnity contracts in conflict with the decision of the Supreme Court of The State of Florida in the case of *Jackson, et al v. Florida Weathermakers*, (Fla. 1951), 55 So. 2d 575, or, taking the view that the Florida law is unresolved on the question of whether or not an indemnitee may by contract indemnify himself against the consequences of his own negligence without spelling out that intent in clear and uniquivocal terms, this Court has undertaken to write Florida law and place Florida in the distinct minority on this most important question of contract law without certifying the question to the Florida Supreme Court for an opinion on the Florida law, as provided for by Section 25.031, Florida Statutes and Rule 4.61, Florida Appellate Rules. See *Sun Insurance Office, Limited v Clay*, (CCA-5), 265 Fed. 2d 522 *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207, 80 Sup. Ct. 1222, 4 L. Ed 2d 1170; *Sun Insurance Office, Limited v John Clay* (Fla. Sup. Ct.), 133 So. 2d 735.

6. The aforesaid opinion of this Court of November 17, 1961 denies to this Appellee equal protection of the laws

as guaranteed by Section 1, 14th Amendment to the Constitution of The United States of America and Section 1, Declaration of Rights, Constitution of The State of Florida in that this Court denys this Appellee the defense or set-off based upon Appellant's breach of its contract (Paragraph 5 of the lease agreement) to maintain the track involved in accordance with its own standard, which breach of contract on the part of Appellant was determined by the jury to be the cause for the loss and damage for which Appellant sought indemnification. The effect of said opinion is to confer upon Appellant the right to enforce the contract against Appellee and to collect from Appellee under the indemnification clause, but at the same time to deny to Appellee the right to recoup, or claim a set-off, or to defend the action on the ground of Appellant's breach of the same contract, which breach on the part of the Appellant caused the loss for which indemnification is sought.

WHEREFORE, the Appellee respectfully prays that this Petition for Rehearing be granted; that this Court reconsider and recede from its opinion entered herein on November 17, 1961; that the final judgment entered in this cause in the United States District Court for the Southern District of Florida, Jacksonville Division be affirmed; or, in the alternate, that this Court certify to the Supreme Court of The State of Florida, under the provisions of Section 25.031, Florida Statutes and Rule 4.61, Florida Appellate Rules, the question of whether or not the law of the State of Florida conforms to the majority view that: (1) a contracting party who is not in the insurance business cannot indemnify himself by contract from the results of his own negligence unless such intent is spelled out in the contract in clear and uniquivocal terms; and (2) that such contracts of indemnity must be construed most strictly against the indemnitee and in favor of the indemnitor.

Respectfully submitted this day of December, A. D. 1961.

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5. ORDER OF CIRCUIT COURT OF APPEALS DENYING PETITION FOR REHEARING:

(Caption Omitted)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, JONES and WISDOM, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered case be, and the same is, hereby DENIED.

APPENDIX C

1. OPINION OF FLORIDA SUPREME COURT IN CASE OF JACKSON, ET. AL. V. FLORIDA WEATHERMAKERS, 55 So. 2d 575:

ROBERTS, Justice.

J. E. Jackson and T. F. Cowart, trading and doing business as Jacksonville Meat Company (hereinafter referred to as "Jax Meat"), owned and operated a grocery store in Jacksonville, Florida, at the time of the occurence of the matters and things with which we are here concerned: Jax Meat entered into a written contract with Florida Weathermakers, Inc., for the installation of an air conditioning system in the grocery store; and Florida Weathermakers sub-contracted the electrical wiring part of the job to H. L. Hall, trading and doing business as Hall Electrical Company (herinafter refered to as "Hall.") After the work of installing the air conditioning system had been commenced by Florida Weathermakers and at a time when Hall's employees were engaged in running the wiring system through the attic of the store, a celotex tile fell from the ceiling of the store and struck and injured Mrs. Nellie B. Creasy, who was shopping for groceries in the store. Mrs. Creasy and her husband thereupon filed suit against Jax Meat, Florida Weathermakers, and Hall to recover damages for her injuries.

The three defendants—who defended the suit separate—ly filed their respective answers, denying the allegations of the complaint; and Jax Meat also filed cross-claims against Florida Weathermakers and Hall, alleging therein that the sole proximate cause of Mrs. Creasy's injuries was

the negligence of Hall's or Florida Weathermaker's employees, or both, and that by virtue of the contract between Jax Meat and Florida Weathermakers (which contained a Public Liability Insurance clause) one or both of such co-defendants would be liable over to Jax Meat for all damages, if any, sustained by Jax Meat in the suit. The cross-claims were dismissed upon the motions of the two co-defendants, and the cause went to trial on the issues made by the complaint and the several answers of the defendants, that is, whether each defendant was negligent as charged.

[1] Trial was had before a jury, whose verdict found in favor of the plaintiffs and against Jax Meat and, further, that the defendants Florida Weathermakers and Hall were not guility. Damages were assessed by the jury against Jax Meat in Mrs. Creasy's favor in the amount of $22.000, and for her husband in the amount of $2.500. Judgment was thereupon entered in accordance with such verdict, after the motions for new trial filed by Jax Meat and by the plaintiffs had been denied. Both Jax Meat and the plaintiffs have appealed, but it must be assumed that the plaintiffs have abandoned their cross-appeal, since they have not here briefed or argued their assignments of error and have, in fact, presented a brief in favor of the correctness of the judgment.

We have, then, a situation wherein one defendant, Jax Meat, is the appellant, and the two co-defendants and the plaintiffs are the appellees. A brief in support of the correctness of the judgment has been filed by each of the three appellees.

Florida Weathermakers and Hall and against Jax Meat is inconsistent and should not be allowed to stand, on the theory that Jax Meat is only "derivatively" liable for the injury; and that since the "principal actor," to wit, Hall,

has been exonerated, Jax Meat cannot be held liable. There is no merit to this contention.

[2] Jax Meat first contends that the verdict in favor of The plaintiff charged that Jax Meat knew or in the exercise of reasonable care should have known that Hall's employees were engaged in work between the ceiling joists and roof rafters "thereby creating a dangerous condition and hazard to the plaintiff and others below in said area. * * *"; that it was the duty of Jax Meat "to furnish a safe place for the plaintiff, Nellie B. Creasy, to walk and shop in and about said store and to warn the said plaintiff of the danger of the concealed workmen overhead;" that Jax Meat "failed to comply with their duty in that behalf and carelessly and negligently kept said store open to the public where plaintiff was invited to enter and shop where said concealed workmen were working overhead," and that plaintiff "was thereby furnished an unsafe place to walk and shop therein." Thus, the plaintiff charges Jax Meat with a separate and independent tort from that of its co-defendants, who were sought to be held liable for a concurring act of negligence, to wit, that the agent or employee of one or both of them "so negligently and carelessly managed and conducted himself as to cause one of said 'celotex' blocks with great force and violence to fall down into against and upon the plaintiff, Nellie B Creasy."

[3, 4] Jax Meat's liability, then, is not based on the substantive law of agency or respondeat superior, but on the substantive law of torts. See Devine v. Kroger Grocery & Baking Co., 349 Mo. 621, 162 S. W2d 813. If, in fact, the proof is sufficient to show that Jax Meat failed in its duty to provide plaintiff with a safe place in which to shop, and that this was a substantial factor in causing her injury, then

Jax Meat may be held responsible for the entire injury to plaintiff. 52 AM.Jur., Torts, page 451; Restatement of Torts, Vol. 4, Section 879. As stated in Crenshaw Bros. Produce Co. v. Harper, 142 Fla. 27, 194 So. 353, 359: "A co-defendant in a tort action cannot complain of a verdict rendered in the other defendant's favor, because there can be no contribution among tort-feasors. If an injury be caused by the concurring negligence of two or more parties, each of them is liable to the injured party to the same extent as though it had been caused by his negligence alone. If a judgment for damages in a tort action be rendered against one and in favor of the other defendant or defendants, the only party to the case who has a right to complain of the verdict and judgment rendered in favor of the other party or parties is the plaintiff in the court below." See also H. E. Wolfe Const. Co. v. Ellison, 127 Fla. 808, 174 So. 594, 605. The plaintiffs are not here complaining of the verdict and judgment in favor of Florida Weathermakers and Hall and, in fact—as heretofore noted—have briefed this question against the contention of Jax Meat.

[5] Jax Meat next contends that, in order to sustain the verdict and judgment by which it alone is held liable for Mrs. Creasy's injuries, the evidence must show that its negligence was the sole proximate cause of the injury, that is, that the celotex tile would have fallen even though the workmen above the ceiling had exercised the greatest of care; that this was known or should have been known by Jax Meat, and that Jax Meat should therefore have warned the plaintiff or excluded her from the area of the store above which the men were working. We cannot agree to this contention.

There was ample substantial evidence that Jax Meat

knew, or in the exercise of reasonable care should have known, of the presence of Hall's employees above the ceiling joists in the attic of the store; and the jury had the right to find that, in the exercise of reasonable care, Jax Meat should have warned of the danger or else have blocked off that section of the store. Its failure to do either was, in and of itself, an independent tortious act which was a substantial factor in causing the plaintiffs' injuries—since, obviously, Mrs. Creasy would not have been injured if the section underneath the area where the men were working had been blocked, and it is unlikely that she would have assumed the risk of shopping in that area in the face of a warning of the danger. Thus, under the rule stated in Crenshaw Bros. Produce Co. v. Harper, supra, Jax Meat's liability for the entire injuries was fixed when it was proved guility of an independent tortious act which was a substantial factor in causing the injuries, regardless of whether Hall's agent or employee was or was not guilty of a concurring act of negligence.

Jax Meat also contends that is was reversible error to dismiss its cross-claims against Florida Weathermakers and Hall seeking to recover over from such co-defendants for any liability which might be imposed on Jax Meat. The cross-claims were attacked on the grounds that (1) they failed to state a cause of action, (2) there can be no contribution between joint tort feasors, and (3) the subject matter of the cross-claim did not arise out of "the transaction or occurrence that is the subject matter" of the original action. No one of such grounds was sufficient as a basis for dismissing the cross-claims, and it was error so to do. While such cross-claims may not have stated a cause of action under the general principles of contribution among joint tort feasors—which we do not here decide—they certainly

stated a cause of action for indemnity based on the contract with Florida Weathermakers, since it was alleged therein that the negligence of Florida Weathermakers and or Hall's employee was the sole proximate cause of Mrs. Creasy's injuries. Nor can the allegation that the cause of action was not a proper subject for a cross-claim be sustained. The Statute, Section 52.11(7) provides that "Such cross-claim may include a claim that the party against whom it is asserted, is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant." We think this is sufficiently broad to cover a claim for indemnity arising out of contract, particularly in view of the provisions of paragraph (9) of Section 52.11 that "When found necessary to the ends of justice, the court may order separate trials of the issues made by any counterclaim or cross-claim. * * *"

But we do not think the error in dismissing the cross-claims is sufficient to require a reversal of the judgment here appealed from. The plaintiffs are not concerned with the side issues between Jax Meat and its co-defendants as to which should be ultimately responsible for the damages assessed against Jax Meat. As heretofore noted, Jax Meat may properly be held responsible for the entire harm insofar as the plaintiffs are concerned. Nor did Jax Meat have an absolute right to have the claim against it tried jointly with its claim against Florida Weathermakers and Hall, since if found necessary "to the ends of justice," the court could have ordered a separate trial of such cross-claim, Section 52.11(9), supra.

Since, however, it was error to dismiss the cross-claims, we think that justice will best be served by re-instating the cross-claims so that, after answer thereto, trial may be had

on the question of the liability thereunder of the co-defendants, and so that Jax Meat and its co-defendants may litigate adversely among themselves the question of negligence raised by the cross-claims and the co-defendants answer.

We have carefully considered the remaining questions posed by Jax Meat, and have found no reversible error.

[6] Insofar as the questions of damages is concerned, it has not been made to appear that it was so greatly disproportionate as to justify a reversal or a remittitur. Mrs. Creasy's neck was broken by the impact of the tile, and she was required to wear a rigid neck brace for many months. She suffered great pain and discomfort for a long time, and still suffers intermittent pains of the head and neck, especially during cold or damp weather. There was evidence that the broken vertebra was re-united in a displaced position, so that Mrs. Creasy would have permanent pain and discomfort due to this condition. She has been forced to employ domestic help to do her housework. Under all the circumstances, we do not feel justified in substituting our judgment for that of the jury on the question of Mrs. Creasy's damages.

For the reasons stated, the judgment appealed from is affirmed, with directions to re-instate the cross-claims filed by Jax Meat against Florida Weathermakers and Hall; and the cause is remanded for trial of such cross-claims in accordance with the opinions herein expressed.

Affirmed and remanded.

SEBRING, C. J., and CHAPMAN and ADAMS, JJ., concur.

On Rehearing.

PER CURIAM.

On rehearing granted, we have reconsidered that portion of our former opinion respecting the cross-claims of Jax Meat against Florida Weathermakers and Hall and have determined that it was error to re-instate such cross-claims and remand the cause for trial thereof.

[7] After the cross-claims were dismissed, the trial court proceeded to a trial on the question of the negligence of each defendant. The transcript reflects that each defandant separately defended the charge against it and actively participated in the examination or cross-examination of the witnesses, and it appears that the defendants did actually litigate adversely among themselves the question of whether the plaintiff's injuries were caused "solely and proximately" by reason of the negligence of Hall's employees, as alleged in the cross-claims. Under such circumstances, the jury's verdict of "not guilty" as to Hall must be held to be res adjudicata of the question of Hall's negligence. See Restatement of the Law of Judgments, Section 106; 42 C.J.S., Indemnity, § 32; City of Mobile v. George, 253 Ala. 591, 45 So. 2d 778; Town of Flagstaff v. Walsh, 9 Cir., 9 F.2d 590, certiorari denied 273 U.S. 695, 47 S.Ct. 92, 71 L.Ed. 844.

[8] The cross-claim against Florida Weathermakers was bottomed solely on the contract between Jax Meat and Florida Weathermakers whereby Florida Weathermakers agreed to procure "public liability insurance," which in the absence of clear and unequivocal terms must be construed to be a contract to indemnify only against the negligence of the indemnitor, and not that of the indemnitee. 27 Am.Jur., Indemnity, Section 15; cases collected in Division IV, Subdivision B, of the annotation beginning at page 8 of 175 A.L.R. Since Florida Weathermakers and its sub-

contractor were exonerated by the verdict of the jury, it is no longer important whether or not Florida Weathermakers procured such "public liability insurance."

[9] Section 54.23, Florida Statutes, F.S.A., provides that "No judgment shall be set aside or reversed, or new trial granted * * * unless * * * it shall appear that the error complained of has resulted in a miscarriage of justice." Since, as has been shown, the issues of fact presented by the cross-claims were actually litigated and were determined adversely to Jax Meat, the error in dismissing such cross-claims must be held to be harmless. See 5 C.J.S. Appeal & Error, § 1687, page 857; McKay v. Corwine, 69 Ind.App. 208, 119 N.E. 471; Frankfort Modes Glass Works v. Arbogast, 148 Ky. 4, 145 S.W. 1122.

We therefore recede from that part of our original opinion remanding the cause for a trial of the counterclaims, and the judgment of the lower court is

Affirmed.

SEBRING, C. J., and CHAPMAN, ROBERTS, and MATHEWS, JJ., concur.